

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

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| In Re: |) | Chapter 7 |
| |) | Case No. 03-11489 (KG) |
| PLASSEIN INTERNATIONAL CORP., <u>et al.</u>, |) | Jointly Administered |
| Debtors. |) | |
| | | |
| WILLIAM BRANDT, AS HE IS THE TRUSTEE OF THE ESTATES OF PLASSEIN INTERNATIONAL CORP., et al., |) | Adv. Pro. No. 05-50692 (KG) |
| Plaintiff, |) | BAP 07-62 |
| v. |) | |
| B.A. CAPITAL COMPANY LP, <u>et al.</u>, |) | |
| Defendants. |) | |

DESIGNATION OF ADDITIONAL ITEMS FOR RECORD ON APPEAL

Pursuant to Rule 8006 of the Federal Rules of Bankruptcy Procedure, B.A. Capital Company LP, as appellee, hereby submits the following designation of an additional item to be included in the record in connection with the appeal of the above-captioned adversary proceeding:

1. Transcript of oral argument held on April 12, 2007 before the United States Bankruptcy Court for the District of Delaware [to be docketed].

Dated: May 17, 2007
Wilmington, Delaware



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UNITED STATES BANKRUPTCY COURT

DELAWARE DISTRICT OF DELAWARE

Case No. 03-11489

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In the Matter of:

PLASSEIN INTERNATIONAL CORP., ET. AL.,

Debtor.

- - - - -x

United States Bankruptcy Court

844 King Street

Wilmington, Delaware

April 12, 2007

3:00 PM

B E F O R E:

HON. KEVIN GROSS

U.S. BANKRUPTCY JUDGE

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HEARING re: Motion to Dismiss Adversary Proceeding against
William A. Brandt, Trustee of the Estates of Plassein
International Corp.

Transcribed by: Hana Copperman

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P R O C E E D I N G S

1
2 THE COURT: Good afternoon, counsel. You may be
3 seated. Welcome. I think, besides counsel in the courtroom,
4 Mr. Bennett is on the telephone. Is that correct?

5 MR. BENNETT: That's correct, Your Honor. Thank you
6 for accommodating me.

7 THE COURT: Certainly. And I begin with a little bit
8 of an explanation and an apology, because clearly this case
9 should have been decided long ago. And you were all here
10 months before on oral argument in the matter. And it was a
11 long time ago. And Judge Shapiro -- who's a visiting Judge --
12 and just so you understand I kept asking where he was in his
13 decision. And he kept deferring me that he was working on
14 the -- with the issue shortly. And I received that assurance
15 several times. And finally I decided that it just -- I just
16 had to set it down for oral argument. And I advised him and
17 explained to him that if he were to issue an opinion, then
18 obviously oral argument could be cancelled. He told me to
19 continue to work on the case, and no opinion has been
20 forthcoming, so here we are. And I -- again, I do apologize.
21 I was a roaming Judge in those days, and I think I was
22 extremely deferential to even a visiting Judge who had really
23 given a lot of his time and effort for our benefit. And we
24 were appreciative of that. And also he was, you know, an
25 experienced judge, but I wish he could have done things a

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1 little bit sooner, and here we are today. And I assure you
2 that you'll get a decision quickly in this case. So with that,
3 why don't we begin? Mr. Stearn, good afternoon.

4 MR. STEARN: Good afternoon, Your Honor. Good to see
5 you again.

6 THE COURT: Good to see you. Thank you.

7 MR. STEARN: May it please the Court, for the record,
8 Bob Stearn from Richards, Layton and Finger, here on behalf of
9 defendant BA Capital Company, Your Honor. As you know, there's
10 a single matter on the docket today. It's the motion to
11 dismiss -- motions to dismiss, --

12 THE COURT: Yes.

13 MR. STEARN: -- by various defendants, in the
14 adversary number 05-50692. As Your Honor knows there's
15 multiple defendants who read Otto Reeves. We have, as you see,
16 many similar arguments in our briefs, so what we've decided to
17 do, in an effort to avoid repetition, perhaps be more
18 efficient, is we're going to divide the arguments up amongst
19 counsel, Your Honor, and although there may be some inevitable
20 duplication, we're going to do our best to avoid that. In
21 essence we're going below -- for example, BA Capital will not
22 make every argument in its brief today. We'll be relying, to
23 some extent, on the arguments of our counsel or our
24 codefendants, and also on our briefs --

25 THE COURT: Yes.

1 MR. STEARN: -- for the arguments that we don't make
2 today. And that's true of every defendant.

3 THE COURT: The briefs were very good. And we read
4 them very carefully in the cases, so I think we are extremely
5 well prepared for the argument.

6 MR. STEARN: Thank you, Your Honor. I'd like to
7 start by introducing my co-counsel, Ms. Karen Wagner, of Davis
8 Polk.

9 THE COURT: Welcome, Ms. Wagner. It's good to have
10 you.

11 MS. WAGNER: Thanks.

12 MR. STEARN: Ms. Wagner will present an argument
13 today on behalf of BA Capital.

14 THE COURT: Yes.

15 MR. STEARN: And I think at this point I should turn
16 the podium over to some of my friends so they can make their
17 introductions as well.

18 THE COURT: Thank you.

19 MR. STEARN: Thank you.

20 THE COURT: Thank you, Mr. Stearn. Good to see you.
21 Mr. Baldwin. Good afternoon.

22 MR. BALDWIN: Good afternoon, Your Honor. David
23 Baldwin of Potter, Anderson and Corroon. I represent what
24 we've described as the Key Packaging defendants. With me is
25 co-counsel who's been admitted pro hac vice, Mr. Richard

1 Johnston of --

2 THE COURT: Welcome to you.

3 MR. JOHNSTON: Thank you, Your Honor.

4 MR. BALDWIN: Thank you, Your Honor.

5 THE COURT: Thank you, Mr. Baldwin.

6 MR. SARNA: Good morning, Your Honor. Good
7 afternoon.

8 THE COURT: Good afternoon. Yes.

9 MR. SARNA: Jacob Sarna of Sarna and Associates, P.C.
10 representing the Marshall Plastic Film defendant.

11 THE COURT: Thank you. Welcome to you too, of
12 course. Mr. Palacio?

13 MR. PALACIO: Good afternoon, Your Honor.

14 THE COURT: Are you the newest partner in the
15 courtroom, I guess?

16 MR. PALACIO: Thank you, Your Honor. I appreciate
17 that.

18 THE COURT: Congratulations.

19 MR. PALACIO: Thank you very much. I do appreciate
20 that, indeed. For the record, part of the law firm of Ashby
21 and Geddes of behalf of what I'll call certain Rex shareholders
22 as well as Sam Chebeir. Thank you, Your Honor.

23 THE COURT: Thank you. Ms. Wagner, are you going to
24 begin?

25 MS. WAGNER: I will. Thank you very much.

1 THE COURT: Thank you.

2 MS. WAGNER: Your Honor, as you have heard I will be
3 addressing the question of Section 546(e) of the bankruptcy
4 code.

5 THE COURT: Yes.

6 MS. WAGNER: Your Honor, I know you have read all the
7 briefs carefully. I will quickly try to summarize what's in
8 the complaint, and then summarize my argument. And if at some
9 point you think I'm telling you more than you need to know,
10 just tell me to move on.

11 THE COURT: It's really my style to kind of let
12 counsel argue and ask questions if I have any particular
13 questions and not to argue with counsel. They are here with a
14 plan. I just decide.

15 MS. WAGNER: All right. Well that's certainly a fine
16 role for you, Your Honor. Your Honor, as you know from reading
17 the complaint, in January of 2000 the company called Plassein
18 Packaging Corporation acquired some other companies, also in
19 the packaging industry, and in August, 2000 acquired yet
20 another one. The complaint, by the trustee in this case,
21 alleges that although the company operated for about three
22 years after that time, that those transactions were fraudulent
23 conveyances, constructive fraudulent conveyances. There's no
24 claim here of intentional fraud.

25 THE COURT: All right.

1 MS. WAGNER: And it seeks to avoid the transactions
2 pursuant to which the stock of these corporations was acquired
3 by Plassein. There's no dispute here, Your Honor, that each of
4 these transactions occurred by virtue of a wire transfer
5 pursuant to which funds were transferred from the acquiring
6 corporation through a financial institution, Fleet Bank, to the
7 selling shareholders. And in some cases the funds were
8 transferred to another financial institution for the selling
9 shareholder and then, for example, in the Bank of America
10 Capital Corp. company case the funds came from Fleet Bank, went
11 to Bank of America for the account of Bank of America Capital
12 Corporation. There were two financial institutions involved.

13 THE COURT: But I assume it would be your position
14 that it wouldn't matter if there were just Fleet --

15 MS. WAGNER: Certainly not.

16 THE COURT: -- for purposes of your position.

17 MS. WAGNER: If there's any financial institution
18 involved, we would argue, certainly, that 546(e) applies to
19 block any claim for fraudulent conveyance. Now, indeed, Your
20 Honor, as you know from reading our briefs, it is our position
21 that this Court is bound by the decision of Resorts
22 International in the Third Circuit in which the Third Circuit
23 took an extremely literal view of the application of Section
24 546(e). In that case there was a holder of stock of a public
25 company who inadvertently tendered stock for transfer, and was

1 paid, and later on the issuer, Resorts, filed for bankruptcy
2 and sought to recover the payment as an avoidable transfer.
3 The Court of Appeals began its decision by saying we mean every
4 statutory interpretation by looking to the claim language of
5 the statute. When the statute is clear, when the language is
6 clear, no further inquiry is necessary unless applying the
7 blind language leads to an absurd result. The Court went on to
8 note that the definition of settlement payment, which is the
9 kind of transaction that is protected under Section 546(e), is
10 extremely broad. And said, in the securities industry a
11 settlement payment is generally the transfer of cash or
12 securities made to complete a securities transaction. That is,
13 of course, what happened here, Your Honor.

14 The Court found that even though there was no
15 institution involved in that case from the clearing system, no
16 stockbroker, that was not relevant to its analysis. The Court
17 said that under a literal reading of Section 546 this was a
18 settlement payment made by a financial institution, and held
19 that since there was no absurd result from that literal
20 application of the statute the Court was bound to apply the
21 statute and held that the transaction was protected from
22 avoidance. And we certainly argue, Your Honor, that here as
23 Yourtz decrees that the transfers here must be protected from
24 avoidance. Now the trustee argued a number of things a while
25 ago. Some of which, of course, we responded to, most of them

1 in our brief. One of them is that Section 546(e) should only
2 apply to the securities industry clearance and settlement
3 system. Your Honor, that argument was expressly rejected by
4 the third circuit in the Resorts case, which said that if a
5 financial institution is involved that is sufficient. It is
6 not necessary that a stockbroker be involved.

7 The next argument, which is really a restatement of
8 that one, is that you must read into the definition of
9 settlement payment. Some requirement that the payment actually
10 be made for the purchase of publicly traded securities. And
11 again, Your Honor, that is not something that is written in the
12 statute, and the Third Circuit's Resorts' decision would
13 suggest you are not intended to read extraneous language into
14 that decision. And indeed, Resorts rejected similar arguments
15 that had been made. And holdings, in fact, by other courts, as
16 on versus Yucaipa Capital and the

17 THE COURT: Wieboldt.

18 MS. WAGNER: Wieboldt case. And they rejected those
19 arguments, so again, I think those arguments are out of this
20 case.

21 Thereafter, after the Third Circuit's decision, and
22 before our argument last time, the Hechinger company case,
23 which is cited in our briefs also found that the decision in
24 Resorts was extremely broad, and if a financial institution was
25 involved then the transfer of funds or securities was immune

1 from avoidance. At the time of the briefing last time, there
2 was only one case that had addressed the question of whether
3 securities of a privately held entity would also be entitled to
4 this protection, and that was the Loranger case, which held
5 that 546(e) was applicable. And that the trustee's brief
6 forced an issue with that case. But since the time of the
7 disbriefing in that case there have been a number of other
8 decisions which have held the same thing. One of them is the
9 IT Group case, which was decided by Judge Walrath. In this
10 district, who held that Section 546(e) applies even though, and
11 I quote, "the case does not involve a leveraged buyout,
12 publicly traded stock, or a clearing agency". She too felt
13 bound by the literal application of the Resorts' decision to
14 apply 546(e) to a transfer of funds for stock of privately held
15 enterprise. And that case was very similar to the one here in
16 that one entity was buying stock of another company. Then
17 there was the National Forge decision which was in the Western
18 District of Pennsylvania, which was a -- again, a privately
19 held company's securities case. It was the redemption of
20 certain securities in connection with the creation of an ESOP.
21 And there the Court went at great length into all the decisions
22 having to do with this issue, with the application of 546(e)
23 generally to albiros or other transactions, private, public,
24 everything. And that Court, too, concluded after a very
25 lengthy analysis that the Resorts decision was literal and had

1 to be applied, and it should be applied, and would be applied
2 in that case. Other districts, too, have reached the same
3 conclusion. The Quality Stores case, which we've also provided
4 to the Court, which is the same thing conclusion -- it is not
5 bound by Resorts -- but that Court is not bound by Resorts but
6 certainly felt compelled to follow the reasoning and the logic
7 in the Resorts' decision.

8 Finally, the trustee argues if you find 546(e)
9 ambiguous, you should look to legislative history, and has a
10 long discussion of legislative history and capital markets
11 issues. Your Honor, I think that the decision on Resorts would
12 tell you that 546(e) is not ambiguous. There is no reason to
13 go back to the legislative history or to decisions of other
14 Courts or anywhere. It's very clear on its face what it means.
15 Many Courts have now held it. It's very clear what it means.
16 And therefore, I think as the Hechinger Court noted, the courts
17 of this district are not free to disregard the controlling law
18 of the circuit. The controlling law of the circuit is the
19 Resorts case and, Your Honor, we respectfully suggest that that
20 applies here, and therefore dismissal of the complaint is
21 warranted.

22 THE COURT: Thank you, Ms. Wagner.

23 MS. WAGNER: Thank you, Your Honor.

24 MR. JOHNSTON: Your Honor, good afternoon.

25 THE COURT: Good afternoon.

1 MR. JOHNSTON: I, along with Mr. Bob, will represent
2 the scope of Key Packaging shareholders headed by Dr. Robert
3 Zeitlin and a variety of other, mostly family members. The key
4 shareholders, as I'll refer to them, Your Honor, fully endorse
5 what Ms. Wagner has argued with respect to 546(e). The key
6 shareholders support for this position is articulated, I think
7 at length, in the two briefs we've filed, as well as in two
8 letters which I've sent to follow up on letters that Ms. Wagner
9 sent to Judge Shapiro. Now, I'm not sure whether my letters
10 made it into the record, but they both went to Judge Shapiro,
11 and they've both been included in the binder that, I think, you
12 received.

13 THE COURT: Yes. Yes.

14 MR. JOHNSTON: And I don't think there is any
15 question on the part of counsel that my letters went to the
16 book. I don't intend to reiterate Ms. Wagner's arguments nor
17 the arguments in the briefs about 546(e) other than to submit
18 that Resorts is the binding precedent in this Circuit. This
19 Court is, we submit, bound to follow the Resorts precedent.
20 And that the Resorts precedent does provide for full -- what's
21 been referred to in cases as safe harbor community -- for the
22 transactions involved here, because the transactions involved
23 financial institutions. I intend to focus my remarks, not on
24 546(e) but on a separate statutory argument which is
25 dispositive with respect to all of the defendants. And that

1 defense arises out of Section 1304(a) of the Delaware
2 Fraudulent Conveyance Act. I hasten to add, Your Honor, that
3 the Section 1304(a) argument is independent of, and in
4 addition, to the federal 546(e) ground. Either of these
5 grounds, in and of themselves, are sufficient to require
6 dismissal of the complaint. We submit that together they are
7 insurmountable to the trustee. Although the 1304(a) argument
8 applies to all of the defendants, I would be speaking
9 specifically about the details of the Key Packaging
10 transaction, by way of illustration, and I suspect that my
11 brothers will chime in to the extent that their transactions
12 may be somewhat different, but I think that most proper
13 transactions share similar patterns, and the argument is pretty
14 much applicable to all of them.

15 First Your Honor, a few undisputed facts with respect
16 to Key Packaging transaction. As set forth in the first few
17 substantive paragraphs of the complaint, and I would refer you
18 specifically to paragraphs 37 and 32. In May 1999 and early
19 2000 Plassein Packaging, which was backed by venture capital
20 firms and banks, was organized for the purpose of acquiring a
21 series of small existing packaging companies. Undoubtedly, as
22 the Court can expect, Plassein Packaging expected, through
23 synergies and economies of scale, to do better as a combined
24 company than the six companies had done individually. The Key
25 Packaging shareholders were basically older individuals, in

1 their sixties, and in some cases even older than that, from the
2 same basic family. A company -- Key Packaging -- had been in
3 the family for a long time. And they were attracted to the
4 idea of being able to sell out to another better financed and
5 well-heeled company and use the money for retirement purposes
6 and avoid all of the hassles of having to operate, from long
7 distance, a company.

8 THE COURT: And then these were totally arms length
9 transactions?

10 MR. JOHNSTON: Oh, yes. Yeah. There is no
11 allegation --

12 THE COURT: No.

13 MR. JOHNSTON: -- nor are there any facts to suggest
14 that there was any overlapping between the Plassein Packaging
15 side and the Key Packaging side.

16 THE COURT: Right

17 MR. JOHNSTON: And the negotiations, in fact, went on
18 for several months. I believe there were investment bankers on
19 both sides of the transaction. In January of 2000 Plassein
20 Packaging paid approximately 25,000,000 dollars to Key
21 Packaging. Of that amount, half went to pay off existing debt.
22 So at the closing the Key shareholders, the people I represent,
23 received a net of approximately 12,000,000 dollars for all of
24 their stock in Key Packaging.

25 At the same time, as Ms. Wagner said, Plassein

1 Packaging also bought a couple of other companies. And, to
2 follow up on your earlier question, there was no connection
3 between Key Packaging and any of those other companies. They
4 came, basically, from different parts of the country. They
5 were in different, although somewhat similar manufacturing
6 lines. All of them, way one or another, in packaging or foam
7 products.

8 As soon as the transaction was signed in January of
9 2000, most of the Key shareholders, and certainly all of the
10 family member shareholders, immediately left having anything to
11 do with Key Packaging. Plassein Packaging, which was the
12 acquiring company, proceeded to operate Key Packaging as well
13 as some of these other companies.

14 In August of 2000 Plassein Packaging, as Ms. Wagner
15 alluded to, purchased another company. In all, Plassein
16 Packaging spent a total of about 100,000,000 dollars to
17 acquire, I believe, six different plastic manufacturing
18 companies by the end of 2000.

19 It wasn't until November of 2001 that the complaint
20 alleges that Plassein, or the constituent companies, first
21 defaulted on any obligations. And it wasn't until May of 2003,
22 more than three years after the Key Packaging acquisition, that
23 the Chapter 11 was filed.

24 To say the least, the Key Packaging shareholders are
25 now shocked, not to mention dismayed, to find themselves the

1 defendants in a suit alleging that the money they received
2 after a long, hard, good faith negotiation for the sale of a
3 solid manufacturing company, is supposedly a fraudulent
4 conveyance.

5 Well, Your Honor, as a matter of law, the trustee has
6 not alleged sufficient facts to make the transaction a
7 fraudulent conveyance. Quite simply, the claim doesn't fit the
8 statutory fraudulent conveyance requirements under Section
9 1304(a). I would point out for the Court, although I'm sure
10 the Court is quite familiar with the statute, but it permits a
11 creditor to avoid a transfer, by a debtor, if the debtor made
12 the transfer without receiving reasonably equivalent value, and
13 if, essentially, the transaction rendered the transferor
14 insolvent. The key words for the purposes of the 1304(a)
15 analysis are transfer by a debtor. Here, the complaint
16 alleges, and it's in paragraphs 46 and 69, that Key Packaging,
17 as the so-called January target company, was rendered
18 insolvent. The trustee's brief, at page 6, makes the same
19 point, that each of the January target companies were
20 supposedly rendered insolvent. However, the trustee alleges
21 that the various January target companies are, for the purpose
22 of this complaint, debtors. However the trustee does not
23 satisfy the pleading requirements statute, because he does
24 allege that the debtors, i.e. Key Packaging, made the requisite
25 transfer.

1 The complaint does not seek to blame a transfer by
2 the debtor, namely Key Packaging. All of the documents, all of
3 the relevant documents attached to the complaint by the
4 trustee, show that the transfer of funds to the Key Packaging
5 shareholders were made by Plassein.

6 If you look in particular at the funds flow
7 memorandum, which was attached as Exhibit A to the complaint,
8 the memorandum shows that the outside equity investments and
9 the loan proceeds were delivered to Plassein Packaging. And
10 that Plassein Packaging made the payments to the various
11 shareholders including the Key Packaging shareholders. And I
12 can point you, as our brief does, to several specific pages
13 within the funds flow memorandum which corroborate that it was
14 Plassein that made the payments. For example, in Exhibit A,
15 the funds memorandum, page 08853, says that the company, which
16 is the shorthand for Plassein Packaging --

17 THE COURT: Right.

18 MR. JOHNSTON: -- shall cause 12,000,000 dollars and
19 change to be paid to Key Packaging shareholders. Pages number
20 08872 and 73 show the money coming from Plassein Packaging's
21 account to the Key shareholders in the amount of about
22 12,000,000 dollars. And Exhibit A1, which seems to be in some
23 ways a repeat of some of the documents in Exhibit A, at pages
24 08898 and 8899 confer that Plassein received funds and then
25 paid out, through its bank, 12,000,000 dollars in cash to the

1 Key Packaging shareholders.

2 The trustee has conceded at page 27 of his brief that
3 none of the companies in the January transactions, that
4 supposedly were rendered insolvent by the transaction, made
5 payments to the Key shareholders or any of the other package
6 shareholders, for that matter. Rather the trustee is stuck
7 with the fact that Plassein Packaging made the payments.
8 There's no allegation in the complaint that Plassein Packaging,
9 in making their payment, rendered itself insolvent. And since
10 it's clear that fraudulent conveyance statute refers to
11 transfers by a debtor which rendered that debtor insolvent the
12 trustee's complaint is defective as a matter of law. Now the
13 trustee's response is to say to you that the Court should
14 ignore the language of the statute and allow him to challenge
15 transfers by entities other than a debtor, i.e. be able to
16 challenge a payment made by Plassein by supposedly collapsing
17 various transactions into one. However none of the cases that
18 he cites in this proposition are apposite.

19 THE COURT: Do you inquire actual fraud?

20 MR. JOHNSTON: Well, yes. I mean the first case that
21 he relies on, which is Hechinger, didn't even involve the
22 fraudulent conveyance statute. It had to do with fiduciary
23 duty. He does cite a couple of other cases that discuss
24 collapsing in a LBO situation. But in each one of those cases,
25 whether it be Tabor, whether it be Wieboldt stores, whether it

1 be Rosner, all of those cases require that the plaintiff allege
2 actual fraud, actual intent, actual knowledge that the
3 resulting transaction would lead to an insolvent debt.

4 And I might also add to that list of cases one that
5 wasn't cited by the trustee, because it's a more recent case
6 that was referred to in Ms. Wagner's letters and also in her
7 argument today, the National Forge case. That case did talk
8 about Plassein as well, but it said that the Courts have to
9 focus on the knowledge and the intent of the parties and
10 whether there was, quote, an overall scheme to defraud the
11 creditors.

12 But by contrast, the trustee here has alleged nothing
13 of the sort. The trustee alleges that Plassein Packaging was
14 formed for the purpose of acquiring multiple manufacturing
15 companies, presumably, as I said before, to take advantage of
16 synergies and economies of scale. There is nothing but benign
17 business purpose in that allegation. There's no allegation or
18 complaint that the transaction should be collapsed. There's no
19 allegation that the Key shareholders intended to do anything
20 other than sell out to a better financed, larger company.
21 There's no allegation that Key shareholders knew or had any
22 suspicion that the transactions would somehow result in Key
23 Packaging being insolvent. There's no allegation of fraud.
24 And even if one might try to contend, as perhaps Mr. Bennett
25 will do in a few minutes, there is an allegation of fraud in

1 the complaint by intuition or inference or otherwise, it would
2 fail to meet the pleading by fraud particularity requirements
3 of Rule 9(b).

4 THE COURT: And there is no allegation that the
5 shareholders were acting in consort with one another?

6 MR. JOHNSTON: There are allegations.

7 THE COURT: Among the various companies.

8 MR. JOHNSTON: Correct. And as I said earlier, there
9 is absolutely no connection among any of those companies. They
10 are all totally separate, independent companies and independent
11 shareholders. What the trustee seems to have said, and he says
12 so on page 28 of his brief, is well, if the defendant's state
13 that they know actual claims to render the collapsing theory
14 inappropriate, they're free to raise those facts later on in
15 the proceedings. But what the trustee ignores, Your Honor, is
16 that it is his responsibility to allege facts that weren't
17 collapsing, such as fraudulent intent or actions on the part of
18 the Key shareholders that reflect fraudulent intentions.
19 That's something he's totally failed to do. Rather than it
20 being the responsibility of the defendants to try to respond
21 with facts to allegations that aren't sufficient. The trustee
22 simply has things backwards. Until he alleges sufficient
23 things to bring the case within the rubric of collapsing,
24 there's no responsibility on the part of the defendants to
25 raise facts to rebut collapsing.

1 Moreover, Your Honor, the trustee isn't arguing just
2 for the collapse of transactions. He's essentially arguing for
3 the collapse of companies. He is suggesting, without having
4 argued, or piercing of the corporate veil, that Plassein and
5 Key Packaging and the other target companies as well should
6 somehow be seen as one company, even though for months those
7 companies were negotiating on opposite sides of quite separate
8 tables. Because as I understand it there were separate
9 negotiations between Key Packaging, Plassein and the other
10 target companies. And each one of them took their own course
11 and their own length of time. Without any basis for piercing
12 of the corporate veil their simply is no basis for positive
13 action against the defendants, inasmuch as the trustee has not
14 satisfied the requirements of collapsing. Or indeed for a
15 fraudulent conveyance plan. The case should be discussed,
16 therefore, for failure to plead a fraudulent transfer by 8(f).

17 Your Honor, the Key shareholders also have a second
18 state law argument based on the requirement that the debtor be
19 insolvent at the time that the transfer took place. And we
20 have argued that the trustee's own attachments to the plate
21 demonstrate that Key Packaging was not insolvent as of the time
22 of the transfer, either just before or just after. We made the
23 point in the briefs. I'm not going to belabor it here. Unless
24 the Court has any questions I'm prepared to rely on our briefs
25 for that point. So, in summary, Your Honor, on behalf of the

1 Key Packaging defendants, we submit that Section 546(e) defense
2 defeats the trustee's claims with respect to all of the
3 defendants, and certainly with respect to the Key Packaging
4 defendants.

5 In addition, the fact that it was Plassein Packaging
6 that made the payments to the Key Packaging shareholders,
7 rather than Key Packaging, defeats the fraudulent conveyance
8 plan as a second statutory basis.

9 Therefore all the claims against Dr. Zeitlin and his
10 other Key Packaging defendants should be dismissed. Thank you
11 very much.

12 THE COURT: Thank you very much, Mr. Johnston. Mr.
13 Sarna?

14 MR. SARNA: Thank you, Your Honor. It's not often
15 that an attorney gets to say me too. And it's not often that
16 an attorney actually takes advantage of the opportunity to be
17 brief. But I will say both me too and be brief. The only
18 thing that I would add here is that when we were here last
19 time, and in the trustee's response to the various motions to
20 dismiss, the trustee has himself conceded that this Court is
21 bound to follow Resorts. An he has then reserved the right to
22 make an argument that that decision ought to be reconsidered
23 and modified to the Circuit Court. That's on page ten in
24 footnote number 3. So I would just want to make sure that's on
25 the record. Point that out. Say me too and I'll leave it to

1 someone else.

2 THE COURT: Thank you. Thank you. Mr. Palacio, good
3 afternoon and was it you who made, or your colleagues who made,
4 the statute of limitations argument?

5 MR. PALACIO: I don't believe that was ours. It was
6 Marshall Plastic.

7 THE COURT: It was? Okay.

8 MR. SARNA: And I believe that that's already been
9 addressed, and so we --

10 THE COURT: We've thrown that argument.

11 MR. SARNA: We're being especially brief.

12 THE COURT: Okay. Thank you, Mr. Sarno.

13 MR. PALACIO: Your Honor, I will be equally as brief
14 by joining all the arguments already expressed as those
15 arguments apply to our cases and specific facts as we believe
16 they are completely applicable, and therefore I'll rest on the
17 arguments made. Your Honor, I simply rest this point to make
18 that point on the record and second, reserve my right on
19 rebuttal to be heard, if the Court deems it appropriate.

20 THE COURT: Thank you very much, Mr. Palacio. I
21 think we've now heard from all the defendants, and I'm going to
22 turn the argument over to Mr. Bennett. And I would note to
23 you, that I think those of us who knew him know that then Judge
24 McKelvey was no shrinking violet and he recognized that whether
25 he thought this work was right or wrong it was -- he was not

1 free to disregard it. And I guess my question for you, Mr.
2 Bennett, is, you know, in a few weeks I'm going off to a
3 conference, a Third Circuit conference -- and tell me why, if I
4 follow your arguments, it will be my last Third Circuit
5 conference.

6 MR. BENNETT: Hey, Your Honor. My position is that,
7 as set forth in our brief, that Resorts establishes the
8 application of 546(e) to a settlement payment, establishes that
9 a leveraged buyout can fall within the purview of 546(e). It
10 does run contrary to a number of other decisions, but
11 unfortunately for the trustee's case those other decisions are
12 all outside the Third Circuit, and if I want to completely
13 reverse Resorts, I agree that I need to do that in front of the
14 Third Circuit. However, we did argue that there is an
15 exception open in Resorts, which is that it needs to be a
16 situation -- or the factual presentation needs to be one in
17 which the public is involved in which there is public
18 securities being traded, transacted, sold, bought or paid for.
19 And that a purely private transaction, such as the one that's
20 before you today, where the only involvement of any entity that
21 would be done within the purview of a settlement payment, is
22 Fleet acting as a financial institution. But solely acting to
23 transfer funds by wire transfer out of the buyer's account into
24 the seller's account. That that transaction was not covered by
25 Resorts, was not governed by Resorts, and therefore you would

1 be free to determine that this case could go forward, because
2 it's not a settlement payment contemplated either by the
3 statute or by Resorts. Now I understand that my argument is
4 now directly contrary to the position taken by Judge Walrath in
5 the IT Group case. All I can say on that point, Your Honor, is
6 I think Judge Walrath was wrong, and I would ask you to find
7 different from her. And find that in a purely private
8 transaction 546(e) is not applicable.

9 THE COURT: Okay. And as far as your position is
10 concerned, you're not challenging that Fleet Bank is a
11 financial institution within the definition of a 546?

12 MR. BENNETT: I am not challenging that Fleet is a
13 financial institution as defined by, I think it's 10122. But
14 that it is not in the context of what it did in this case. It
15 was certainly not acting to transfer securities or act in a
16 capacity as a custodian or other holder of securities. So it
17 was not in any way acting under any of the commonly referred to
18 provisions under 741, such as a clearing. It was not acting,
19 certainly, as a clearing house or otherwise. That it had a
20 limited role solely to effectuate the wire transfer.

21 THE COURT: And are you alleging -- I don't see it
22 under plaintiff or any allegation of actual fraud.

23 MR. BENNETT: No, Your Honor, there is none. It's
24 based on a constructive fraud.

25 THE COURT: Okay. Okay. I think I understand your

1 position and it's essentially that if I have ever found the
2 Third Circuit to reconsider its decision of the Resorts case.
3 Or to -- (Indiscernible) the Resorts decision to public
4 trading.

5 MR. BENNETT: That is correct, Your Honor.

6 THE COURT: Okay.

7 MR. BENNETT: I don't know to what extent you wish me
8 to address Attorney Johnston's argument, though, for the Key
9 Shareholders on the application of 1304. To the extent that
10 you wish to hear anything on that, I'd be referred to the
11 Hechinger's case, which is a Third Circuit Case, and their
12 definition of the application of the facts to almost identical
13 to these facts, define them as a leveraged buyout. And finding
14 that the fraudulent conveyance law would be applicable. I'm
15 not asserting that there was any actual intent, but that's not
16 necessary. You can find constructive intent where, as they
17 defined in Hechinger's, the acquiring company's assets are
18 leveraged -- I'm sorry the target company's assets are
19 leveraged for the purposes of borrowing and paying off the
20 selling shareholders. Thank you, Your Honor.

21 THE COURT: Thank you, Mr. Bennett. Mr. Johnston,
22 perhaps you could just address that final fling on the
23 Hechinger's decision and the Delaware code Section 1304(a).

24 MR. JOHNSTON: Your Honor, I think I would simply say
25 that the Hechinger case did not involve a fraudulent conveyance

1 claim, as such, but rather involved the application of the
2 future A to E law, so it would be my view that Hechinger is not
3 applicable in this case. I did address some of the other cases
4 that dealt with fraudulent conveyance claims, and in each one
5 of those the Court required a showing of intent or fraud or a
6 scheme on the part of the defendants. And that's simply not
7 present in this case.

8 THE COURT: Thank you, Mr. Johnston.

9 MR. JOHNSTON: And Your Honor, just one further
10 point. I have not yet submitted a form order as I know at
11 least one of the other defendants did, and so if at some point
12 it becomes appropriate I would happily do so.

13 THE COURT: If need be I'll ask your local counsel to
14 do that for Mr. Baldwin, but I would anticipate doing the form
15 work myself. But I appreciate the offer.

16 MR. JOHNSTON: Thank you very much.

17 THE COURT: Is there anything further from anyone?
18 Well I appreciate it. And as I told you I've read the briefs
19 carefully, and named many of the cases, and given the long
20 delay, given the fact that I know that crisis effect that Mr.
21 Bennett may be trying to take this matter upon further, I think
22 I would like to issue, at least, a fairly careful written
23 opinion, but having read the arguments and heard argument, in
24 particular the oral argument, I've not been dissuaded from my
25 view that dismissal is going to be appropriate -- is

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1 appropriate in this case. And I will be, as I said, writing
2 the -- the date for taking your opinion, Mr. Bennett, doesn't
3 run until I actually issue the order -- but I haven't read
4 anything that convinces me that this isn't a settlement payment
5 which the Resorts case covers. And I also appreciate -- I do
6 want to look again a little more carefully and go back and look
7 at the Delaware code Section II fraudulent conveyances 1304. I
8 believe that Mr. Johnston has made a good point on that as
9 well. I just want to take another look at that position before
10 I make a decision, but regardless of where I come out on the
11 Delaware code provision, the state provision, I just think that
12 under the bankruptcy statute, the plaintiff has not made out a
13 case which should proceed and then that will be what we've been
14 receiving from the immersion orders so that we can move things
15 along here. I appreciate everyone's patience, and we'll stand
16 on recess. Thank you very much, counsel.

17 MR. SPEAKER: Thank you, Your Honor.

18 MR. SPEAKER: Thank you.

19 MR. SPEAKER: Thank you, Your Honor.

20 (Time noted: 3:40 PM)

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C E R T I F I C A T I O N

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